(2)

No. 90-699

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1990

UNITED TRANSPORTATION UNION,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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December 3, 1990

QUESTION PRESENTED

Whether a court may set aside arbitration awards under Section 3, First (q) of the Railway Labor Act, 45 U.S.C. § 153, First (q), when the arbitral board exceeds its jurisdiction because the awards are not based on the terms of the relevant collective bargaining agreement, fail to take into account the existing common law of the particular plant or industry, and attempt to rewrite the parties' collective bargaining agreements by creating new substantive rules?

RULE 29.1 LIST

Respondent CSX Transportation, Inc. ("CSXT") is a wholly-owned subsidiary of CSX Corporation ("CSX"). The subsidiaries and affiliates of CSXT or CSX, other than those wholly owned by them, are:

The Akron Union Passenger Depot Company;
Allegheny and Western Railway Company;
Augusta and Summerville Railroad Company;
The Baltimore and Cumberland Valley Railroad Extension Company;
Beaver Street Tower Company;
Central Transfer Railway and Storage Company;
Chatham Terminal Company;
Clearfield and Mahoning Railway Company;
Dayton and Michigan Railroad Company;
The Home Avenue Railroad Company;
The Lakefront Dock and Railroad Terminal Company;
Mid-Allegheny Corporation;
North Charleston Terminal Company;
Richmond-Washington Company, which has a subsidiary, RF&P Corporation;
Winston-Salem Southbound Railway Company;
Woodstock & Blockton Railway Company.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent CSX Transportation, Inc. ("CSXT") respectfully requests that this Court deny the petition for writ of certiorari submitted by the United Transportation Union ("UTU") seeking review of the unpublished decision of the United States Court of Appeals for the Sixth Circuit in *United Transp. Union v. CSX Transp., Inc.*, No. 89-3344 (6th Cir. Aug. 2, 1990) [hereinafter cited as "*UTU v. CSXT*"].

COUNTERSTATEMENT OF THE CASE

This petition involves the review of Award Nos. 120 and 121 of an arbitration panel, Public Law Board No. 3290 ("PLB 3290"), which was established pursuant to Section 3, Second of the Railway Labor Act ("RLA"), 45 U.S.C. § 153, Second. App. 6a.1/ Awards 120 and 121 involved CSXT's procedures for controlling train movements to ensure safe operations at obstructed or potentially obstructed track sites.2/ Awards 120 and 121 arose from UTU grievances claiming that CSXT had violated its collective bargaining agreement by failing to assign a UTU member to provide "flagging" protection at each of two construction sites located at Akron, Ohio and Cumberland, Maryland, respectively. Flagging is the assignment of an employee to physically flag oncoming trains to stop in advance of the work site. J.A. 317. At the Akron and Cumberland work sites, CSXT used alternative train control procedures set forth in its operating rules involving train orders3/ and (at Cumberland) proceed signals4/ to safely control train

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1/ The Appendix to the Petition for Certiorari is cited herein as "App." The Joint Appendix filed in the Sixth Circuit is cited as "J.A."

2/ Construction and repair of highway and railroad bridges often occurs at locations adjacent to CSXT's tracks where highways, streets or other railroad tracks pass over CSXT's tracks, resulting in potential obstruction of those tracks. CSXT's own track maintenance programs also regularly require restrictions on train movements through such work sites. J.A. 317.

3/ A train order is a written directive that directs and controls the permissible movement of a train by its operating crew. App. 5a; J.A. 41-44.

4/ "Proceed signals" are part of an established alternative procedure for authorizing railroad maintenance of way employees to work at designated locations without flag protection. A train order directs the train crew to stop the train in advance of the protected track site. CSXT maintenance of way

(continued...)

movements without assignment of any employee to physically flag oncoming trains to stop.

It is undisputed that if CSXT decides to use a flagman at obstructed track sites in order to ensure safe operation of its trains, it is required to use UTU-represented employees to perform the flagging. However, at the time the Akron and Cumberland disputes arose, CSXT had a well-established past practice of more than 12 years duration of controlling and stopping train movements in advance of potential track obstructions without the use of a flagman. For many years CSXT had controlled and stopped train movements at construction or work sites by means of train orders or other operating rules directed to the train crews operating the train. J.A. 317. During the 1960's, CSXT developed specific procedures to protect track work sites which did not utilize flagging, and those past practices were expressly reflected in CSXT's operating rules. J.A. 318-19. The controlling operating rule was Operating Rule 707, entitled "Work Authority to Work Without Flag Protection," which provided, in pertinent part:

> 707(f) When conditions will not permit turning the track over to Work Force(s) as prescribed in Rules 707(c) and 707(d), or if the nature of the work may cause equipment to foul adjacent tracks, *work by Work Force(s) may be performed under traffic without flag protection by use of a train order.* During the time specified in the train order, all trains will move within the work limits prepared to

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4/ (...continued)
employees at the site, not represented by UTU or subject to the CSXT-UTU collective bargaining agreement, provide the hand proceed signals when the maintenance force concludes that it is safe for trains to proceed through the work site. J.A. 319-20.

> stop within one-half the range of vision and not proceed beyond the point of work *except on yellow hand proceed signal or oral authority from employee in charge of work.*

App. 21a, J.A. 319 (emphasis added).5/ Thus, CSXT's unambiguous operating rules accord CSXT the unilateral right to determine how to control train movements at protected track sites, i.e., to determine whether to use flagging or alternative procedures. These relevant operating rules had become a part of the parties' agreement as a result of undisputed past practices in which UTU had acquiesced. App. 21a-22a.6/

Indeed, there is no provision of the CSXT-UTU collective bargaining agreement that requires obstructed railroad track sites to be protected by a flagman. As provided by its operating rules and procedures, when CSXT utilizes a train order to protect a portion of track, no physical flagging of trains to a stop is required or performed. The train order stops the train, not a flagman. Giving yellow hand proceed signals or oral authority to proceed does not constitute flagging of a train. J.A. 319.

5/ In addition, Operating Rule 93, which applied to CSXT's main track within yard limits (such as was involved in the Akron dispute) provided that "[w]ithin yard limits, trains and engines must move prepared to stop within one-half the range of vision, not exceeding twenty (20) MPH unless the main track is known to be clear by block signal indication." App. 22a.

6/ These relevant operating rules are no less a part of the agreement because they accord CSXT the right to determine how to control train movements. "Collective bargaining agreements often incorporate express or implied terms that are designed to give management, or the union, a degree of freedom of action within a specified area of activity." *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. ____, 109 S. Ct. 2477, 2483 (1989). The fact that CSXT may at some future time unilaterally change these operating rules is also a past practice acquiesced in by UTU.

Since the specific Rule 707(f) procedure was developed in the 1960s, that procedure has been utilized consistently and repeatedly to control train movements through work sites without assigning UTU-represented employees to give yellow hand proceed signals, to provide oral authority to proceed or to give flagging protection at track locations protected by the applicable train orders. J.A. 319-20. Moreover, notwithstanding CSXT's long-standing practice, the UTU had never filed a grievance claiming that so controlling train movements violated the CSXT-UTU collective bargaining agreement until the claims were filed in the Akron and Cumberland disputes, which involved events in 1981-1982. J.A. 320.

Arbitration Proceedings

The parties agreed that the UTU's claims would be heard by PLB 3290. In the agreement establishing PLB 3290, the parties prohibited PLB 3290 from dealing with issues other than those "submitted to it under this agreement," and further limited its jurisdiction as follows:

> The Board shall not have jurisdiction of disputes growing out of requests for changes in rates of pay, rules or working conditions *nor have authority to change existing agreements or establish new rules.*

App. 6a, 21a; J.A. 163 (emphasis added).

The two UTU grievances were treated as companion cases by PLB 3290. App. 6a. In both disputes, the UTU argued that the use of the alternative operating rule/train

order procedure to protect track sites itself established a need for and was equivalent to providing flag protection.7/

CSXT presented evidence to PLB 3290 of the common and long-standing practices utilizing train orders issued pursuant to operating rules to control train movements through construction sites without the assignment of a flagman. J.A. 323. PLB 3290 was specifically advised of the text of CSXT's relevant operating rules and that CSXT had controlled the movement of CSXT's trains at both work sites by use of operating rule procedures. J.A. 216, 323.

The Arbitration Awards

On May 11, 1987, over 20 months after the close of the arbitration hearing, PLB 3290 issued Awards 120 (Akron dispute) and Award 121 (Cumberland dispute). PLB 3290 sustained the claims of the employees in both disputes. However, neither award discussed any provision of the written CSXT-UTU collective bargaining agreement or CSXT's undisputed past practice, incorporated in its operating rules

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7/ In the Akron dispute (resulting in Award 120), the UTU's submission stated:

> The issue in the instant claim is when flag protection is necessary, the Carrier should have used a member of the craft of conductors or trainmen.
>
> *The Carrier's action of placing various orders into effect whereas in the case here before this Board, is tantamount to providing flag protection to contractor dismantling Market Street Bridge.*

J.A. 284 (emphasis added). In the Cumberland dispute (Award 121), the UTU submission stated that "[t]he placing of an order requiring a train to stop and proceed by authority is tantamount to flagging a train." J.A. 188.

and a part of its bargaining agreement, under which CSXT may control train movements at protected track sites by the use of its operating rules, including train orders and proceed signals. Instead, PLB 3290 relied upon CSXT's very use of these long-standing *alternative* operating rule procedures to conclude that CSXT was "required" to station a UTU-represented flagman at each construction site. J.A. 13,16.

For example, in Award 120 (Akron), PLB 3290 identified the issue to be decided as follows:

> *The issue here in dispute, as we view it, concerns more the contention of the Organization [UTU] that there was a need for flag protection at the construction site* regardless of the type of mechanical equipment or cranes being used by the contractor and that the Claimant or Claimants should have been called for such work.

App. 23a, J.A. 13 (emphasis added). PLB 3290 found that "a flagging service was both needed and essentially being performed." J.A. 13. However, in reaching this conclusion, PLB 3290 neither cited nor purported to interpret any provision of the labor contract between UTU and CSXT. Instead, PLB 3290 relied upon the fact that the carrier had found a need to control train movements by issuing a train order. PLB 3290 stated, *inter alia*:

> We [reach these conclusions] in the light of the Carrier having found need to place the train order in effect so as to have its engine and train crews stop at the construction site to check for debris before proceeding . . . .

J.A. 13. Thus, PLB 3290 relied upon the implementation of an alternative procedure expressly authorized by the carrier's controlling operating rules and undisputed past practice to conclude that "a *hazardous condition existed* at the construction site *that required the protection of a flagman.*" J.A. 13 (emphasis added).

PLB 3290's decision in Award 121 (Cumberland) was based upon the same rationale:

> Essentially, the record shows that the Carrier's train order required all trains to stop unless they received verbal authority or a hand signal to proceed. Thus, it seems evident that the trains operating over the Carrier's main line were subject to being flagged through the construction site, with the work force employees permitting trains to proceed by either radio or hand communications signals.

J.A. 16. PLB 3290 thus relied upon the use of a train order and radio or hand communication signals to sustain the claims. Both are, however, long-standing and undisputed procedures that have become incorporated in the parties' agreement, and are specifically authorized by Rule 707(f), which has the stated purpose of permitting the carrier to operate safely without the need for flag protection. J.A. 159-60.

District Court Proceedings

The civil action from which this petition arises was initially commenced by UTU seeking to enforce Awards 120 and 121 pursuant to RLA Section 3, First (p), 45 U.S.C. § 153, First (p). CSXT answered and filed a counterclaim seeking review of the awards by PLB 3290 pursuant to RLA

Section 3, First (q), 45 U.S.C. § 153, First (q).8/ UTU and CSXT filed cross-motions for summary judgment. On March 20, 1989, the district court held that "the awards must be set aside on the ground that [PLB 3290] has exceeded its jurisdiction by imposing operating rules upon CSX . . . ," App. 31a, finding that: (i) "[t]here is no dispute that CSX has the unilateral authority to dictate the operation and handling of its trains," App. 28a; (ii) in the disputes that gave rise to both awards, CSXT had controlled the train movements at protected work sites by train order and/or a superintendent's bulletin pursuant to its operating rules, App. 27a-28a; (iii) there was no evidence that any train had actually been "flagged," App. 29a; (iv) PLB 3290 "decided, in both awards, that CSX ought to have chosen to protect its trains by flagging," App. 30a; and (v) PLB 3290 exceeded its jurisdiction because "[t]he Board is not empowered to establish new rules for flag protection of trains passing through construction sites; that assessment is concededly the exclusive province of CSX." App. 32a.

Sixth Circuit Proceedings

UTU's appeal produced three separate opinions by the Sixth Circuit panel. On April 26, 1990, in an opinion by Judge Lively, the Sixth Circuit purported to reverse and remand the case to the district court "with directions to enter judgment enforcing the awards." App. 20a. Judge Lively's opinion was in four parts: part I summarized the case; part II summarized the legal standards and the contentions of the

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8/ PLB 3290 is not a division of the NRAB, but was established by agreement between the UTU and the carrier pursuant to 45 U.S.C. § 153, Second. App. 6a. The awards of such "public law boards" are subject to judicial review and enforcement in the same manner and to the same extent as awards of the NRAB. *See Cole v. Erie Lackawanna Ry.*, 541 F.2d 528, 533 (6th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977); *cf. Jones v. St. Louis-S.F. Ry.*, 728 F.2d 257, 262 n.4 (6th Cir. 1984).

parties; part III held that PLB 3290 did not exceed its jurisdiction; and part IV rejected alternative grounds that CSXT had advanced for affirmance of the district court's opinion. The critical portion of Judge Lively's opinion was part III, in which he concluded that the awards of PLB 3290 "can be read to state that the actions of CSX indicated that the railroad found a need for flagging and followed procedures that were the equivalent of flagging. Thus read the award did not re-write the collective bargaining agreement or impose a new rule requiring flagging through all construction sites." App. 14a.

The other panel members, Judges Kennedy and Guy, in separate opinions, dissented from part III of Judge Lively's opinion. Judge Kennedy stated that "I do not disagree with the majority's legal analysis, but rather with the conclusion that the Board confined itself to matters within its jurisdiction." App. 20a. Observing that "[f]or many, many years CSX has used train orders and proceed signals at some construction sites," Judge Kennedy found that examining PLB 3290's "opinions in the two cases makes it clear that it decided in appellant's favor not by interpreting the agreement and applicable 'shop law,' but rather by deciding that flagging was necessary at both sites and that CSX should have used the claimants." App. 22a-23a. Judge Kennedy found PLB 3290 exceeded its jurisdiction by (i) failing to draw the essence of its Awards from the collective bargaining agreement, as evidenced by "the fact that the Board failed to consider either the contract language or the 'law of the shop' here expressed in written rules which vested authority with CSX to determine whether to use flagmen or to issue train orders at construction sites . . .," and (ii) "chang[ing] a substantive rule regarding flag protection--that is, that CSX no longer has discretion to choose the means of protecting workers." App. 24a.

While Judge Guy concurred in parts I, II and IV of Judge Lively's opinion, he expressly dissented "from part III and

join[ed] with Judge Kennedy's resolution of that issue," stating that "I believe, as Judge Kennedy concluded, that the Board actually decided the need for flagging rather than the question that was properly before them." App. 25a.

On May 10, 1990, CSXT moved to amend the Sixth Circuit's judgment to conform to opinions and, in the alternative, petitioned for rehearing and suggested rehearing en banc. The ground for the motion was that the three initial opinions showed that a majority of the Sixth Circuit panel, i.e., Judges Kennedy and Guy, held that PLB 3290 had exceeded its jurisdiction. CSXT's motion was granted by the original panel on June 19, 1990. App. 1a-2a. UTU petitioned for rehearing and suggested rehearing en banc, which were denied by the Sixth Circuit on August 2, 1990. App. 3a.

REASONS WHY THE PETITION SHOULD BE DENIED

The decision of the Sixth Circuit in *UTU v. CSXT* does not warrant review by this Court. The Sixth Circuit applied uniform and stable standards of judicial review in affirming the vacating of awards that did not draw their essence from the collective bargaining agreement and imposed new substantive rules on the parties, thereby exceeding the arbitral board's jurisdiction.

UTU simply errs in asserting that the Sixth Circuit reviewed the merits of the contractual issues *de novo*. Instead, the Sixth Circuit determined that the awards ignored undisputed past practice evidenced in written operating rules that had become a part of the collective bargaining agreement, that they violated express limitations upon creating new rules, and that they determined the "need" for flagging, a matter outside the Board's jurisdiction. Such determinations are neither exceptional nor objectionable. Indeed, under the established and accepted standards of review of RLA

arbitration awards, courts must set aside arbitral awards that, as here, are not based on the terms of the relevant collective bargaining agreement but on the arbitrator's determination of "need," rewrite the collective bargaining agreement of the parties, and fail to take into account any existing common law of the particular plant or industry. Neither *Union Pac. R.R. v. Sheehan*, 439 U.S. 89 (1978), *Gunther v. San Diego & A. E. Ry.*, 382 U.S. 257 (1965), *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. ___, 109 S. Ct. 2477 (1989), nor the decisions of the courts of appeals upon which UTU relies conflict with the Sixth Circuit's decision to vacate such awards.

In fact, the authorities cited by UTU to establish a "conflict" merely involve instances where arbitrators did not make the same jurisdictional errors present in *UTU v. CSXT*. Such episodic distinctions, resulting from the application of uniform legal standards to disparate facts, does not present an issue of importance warranting this Court's review.

I. The Sixth Circuit's Determination That The Public Law Board Exceeded Its Jurisdiction Neither Raises An Important Issue Requiring This Court's Attention Nor Conflicts With Decisions Of This Court

A. The Sixth Circuit Applied Uniform, Stable And Statutorily-Mandated Standards Of Review Of Arbitral Awards

In *UTU v. CSXT*, the Sixth Circuit applied uniform and stable precedent concerning the statutorily-mandated judicial review of RLA arbitral awards. Indeed, in *UTU v. CSXT* both members of the majority expressly concurred in the minority's analysis of the standards of review of arbitral awards prescribed in 45 U.S.C. § 153, First (q). The minority in *UTU v. CSXT* discussed *Union Pac. R.R. v. Sheehan*, 439 U.S. 89 (1978), *Gunther v. San Diego & A.E. Ry.*, 382 U.S. 257 (1965),

and *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. __, 109 S. Ct. 2477 (1989) ("*Conrail*"), and concluded that in determining whether an arbitrator exceeded his jurisdiction "a court's duty is 'to ascertain whether the arbitrator's award is derived in some rational way from the collective bargaining agreement.'" App. 11a (quoting *Detroit Coil Co. v. International Ass'n of Machinists & Aerospace Workers*, 594 F.2d 575, 579 (6th Cir.), *cert. denied*, 444 U.S. 840 (1979)).9/ Thus, contrary to UTU's claims, the majority in *UTU v. CSXT* expressly adopted and applied the determinative precedent of this Court in setting aside arbitral awards that did not "draw [their] essence from the contract," that rewrote the parties' agreement by "chang[ing] a substantive rule," and that "failed to consider either the contract language or the 'law of the shop.'" App. at 24a.

This Court recognized in *Gunther* that courts may set aside RLA arbitral awards that are "completely baseless and without reason." 382 U.S. at 261. "The requirement that the result of the arbitration have 'foundation in reason or fact' means that the award must, in some logical way, be derived from the wording or purpose of the contract." *Brotherhood of R.R. Trainmen v. Central of Georgia Ry.*, 415 F.2d 403, 411 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970). Indeed, the decision in *UTU v. CSXT* was expressly grounded on the seminal decision in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his

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9/ Judge Lively set forth his legal analysis of the standards of review, discussing *Sheehan*, *Gunther* and *Conrail*, in Part II of his opinion. App. 8a-11a. Judge Kennedy stated that he did "not disagree with the majority's legal analysis," App. 20a, and Judge Guy expressly concurred in Part II of Judge Lively's opinion. App. 25a.

> own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Id. at 597. Although *Enterprise Wheel* did not arise under the RLA, Congress in 1966 "sought to incorporate" the standard of review set forth in *Enterprise Wheel* in 45 U.S.C. § 153, First (q), which expresly authorizes district courts to review and set aside arbitral awards for "failure of the Adjustment Board to conform or to confine itself to matters within the scope of its jurisdiction. . . ." *Central of Georgia Ry.*, 415 F.2d at 411-12.10/

In any event, UTU errs in asserting that *Conrail, Sheehan* and *Gunther* conflict with the Sixth Circuit's determination that Awards 120 and 121 exceeded the jurisdiction of the arbitral board. *Conrail* did not involve the review of an arbitral award under 45 U.S.C. § 153, First (q). Instead, *Conrail* set forth the standards to determine whether a dispute should be classified as "major" or "minor" *i.e.*, whether a dispute had to be arbitrated. 109 S. Ct. at 2479. *Conrail* is simply inapposite, because in *UTU v. CSXT* there was no question that the dispute was minor and therefore subject to arbitration.

10/ *See also Brotherhood of Locomotive Eng'rs v. Atchison, T. & S.F. Ry.*, 768 F.2d 914, 921 (7th Cir. 1985)("The question for a court reviewing a railroad arbitration decision is much the same--maybe exactly the same, though differently expressed--as when a court is asked to set aside a labor arbitrator's award in an industry subject to section 301 of the Taft-Hartley Act, 29 U.S.C. § 185, rather than the Railway Labor Act.").

Sheehan and *Gunther* involved the review of arbitral awards, but neither involved the jurisdictional errors at issue in *UTU v. CSXT*. In *Sheehan* it was not even contended that the arbitral board had exceeded its jurisdiction or disregarded a contract term or past practice. 439 U.S. at 93.11/ In *Gunther*, the arbitral board did not disregard the contract or past practice, but expressly relied on both in ordering reinstatement of an employee who had been physically disqualified by the company's doctors, but who was found to be physically qualified by a committee of doctors appointed by the arbitrators. *Id.* at 259. It was the district court in *Gunther* that disregarded past practice and rewrote the agreement by finding "nothing in the agreement restricting the railroad's right to remove its employees for physical disability upon the good-faith findings of disability by its own physicians." *Id.* at 261.

The Sixth Circuit's insistence that the arbitral board refrain from changing the parties' collective bargaining agreement is equally well grounded on the RLA and this Court's precedent. Indeed, the arbitrator's lack of jurisdiction to amend the agreement is not a mere creature of contract, but is a fundamental rule of labor arbitration. *See, e.g., Enterprise Wheel*, 363 U.S. at 597; *Wilson v. Chicago & N.W. Transp. Co.*, 728 F.2d 963, 967 (7th Cir. 1984)("[t]his attempt to rewrite the agreement is a clear violation of the Railway Labor Act"); *Timken Co. v. Local 1123, Steelworkers*, 482 F.2d 1012, 1015 n.2 (6th Cir. 1973).

11/ Indeed, in *Sheehan* the arbitral board had concluded that it was without jurisdiction by applying the limitations period contained in the collective bargaining agreement. This Court reversed the Tenth Circuit's attempt to impose a "legal" requirement of equitable tolling from outside the contract. 439 U.S. at 91-93.

Here, however, UTU and CSXT expressly adopted this requirement in the agreement establishing PLB 3290, placing unambiguous restrictions upon its jurisdiction:

> The Board shall not have jurisdiction of disputes growing out of requests for changes in rates of pay, rules or working conditions nor have authority to change existing agreements or establish new rules.

App. 21a. It is indisputable that there must be "strict adherence" to such restrictions upon arbitral authority. *Jones v. St. Louis-S.F. Ry.*, 728 F.2d 257, 264 (6th Cir. 1984).

> The special [public law] boards' jurisdiction is limited to the jurisdiction that is conferred thereupon by the agreement between the carrier and the union.

Id. (citing *Switchmen's Union v. Clinchfield R.R.*, 310 F. Supp. 606, 610 (E.D. Tenn. 1969), *aff'd sub nom., United Transp. Union v. Clinchfield R.R.*, 427 F.2d 161 (6th Cir.), *cert. denied*, 400 U.S. 824 (1970)); *see also Timken*, 482 F.2d at 1015 (vacating arbitral award that was not based upon contract or past practice--contract expressly "foreclos[ed] arbitrator from substituting his discretion for the company's and from modifying the language of the agreement").

Further, vacating awards that ignore and thereby write out of the agreement either the contract language or the "law of the shop" neither conflicts with this Court's precedent nor presents an important issue warranting review. "[A]rbitrator[s] may not ignore the plain language of the contract . . . ." *United Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987); *accord Hill v. Norfolk & W. Ry.*, 814 F.2d 1192, 1194-95 (7th Cir. 1987). Further, this Court has previously denied a writ of certiorari to the Fourth Circuit in a case in which an arbitral

award that did not take into account and disregarded relevant provisions of the collective bargaining agreement was vacated. *See Baltimore & O. R.R. v. Brotherhood of Ry., Airline & S.S. Clerks*, 108 Lab. Cas. (CCH) ¶ 10,261 at 20,982 (4th Cir. 1987) ("[W]here an arbitrator fails to discuss, in his decision, critical contract terminology, which might reasonably require the opposite result, the award cannot be considered to draw its essence from the contract."), *cert. denied*, 484 U.S. 1008 (1988).12/

Indeed, requiring an arbitrator to consider relevant past practice is necessary to ensure that the arbitral award draws its essence from the collective bargaining agreement, because the "law of the shop" is a part of the collective bargaining agreement. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960).

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law--the practices of the industry and the shop--is equally a part of the collective bargaining agreement although not expressed in it.

Id. Although *Warrior & Gulf* was decided under the Taft-Hartley Act, it is clear that past practices, including those that recognize management's right to act, may become valid and binding parts of collective bargaining agreements under the RLA. *See, e.g., Detroit & T. S.L. R.R. v. UTU*, 396 U.S. 142,

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12/ *See also Norfolk Shipbuilding & Drydock Corp. v. Local No. 684, Boilermakers*, 671 F.2d 797, 799-800 (4th Cir. 1982)("the arbitrator must take into account any existing common law of the particular plant or industry, for it is an integral part of the contract."); *Timken Co. v. Local 1123, Steelworkers*, 482 F.2d 1012, 1015 (6th Cir. 1973)(refusing to enforce an award that ignored unambiguous terms of the collective bargaining agreement and "made no reference whatsoever to shop practices").

152-55 (1969)(established practices "became in reality a part of the actual working conditions"); *Railway Labor Executives' Ass'n v. Norfolk & W. Ry.*, 833 F.2d 700, 705 (7th Cir. 1987)("The parties' collective agreement . . . includes both the specific terms set forth in the written agreement and any well-established practices that constitute a 'course of dealing' between the carrier and the employees.")(footnote omitted). As this Court recently stated, "collective-bargaining agreements may include implied, as well as express, terms . . . [and] the parties' 'practice, usage and custom' is of significance in interpreting their agreement." *Conrail*, 109 S. Ct. at 2485.

In summary, there is neither a dispute over the standards of judicial review of RLA arbitration awards nor a basis for one. Further, as will next be shown, the application of these standards below does not warrant review by this Court.

B. The Sixth Circuit's Application Of Uniform And Stable Precedent To The Unique Facts Of *UTU v. CSXT* Does Not Warrant Review By This Court

Contrary to UTU's claim, the majority in *UTU v. CSXT* applied well established principles of judicial review of arbitral awards in strict compliance with the statutory mandate and the precedent of this Court. The majority found that PLB 3290 flatly ignored unambiguous operating rules and undisputed past practices of more than 12 years duration. App. 21a-22a. These unambiguous rules and past practice, which had become a part of the parties' agreement, established alternative procedures for controlling the movement of trains at obstructed track sites. These rules and practices reserved to CSXT the right to determine which procedure would be utilized. App. 21a-22a, J.A. 318-19. The majority found that PLB 3290 ignored and usurped CSXT's undisputed right to control the safe operations of its trains by determining whether to use the alternative train order procedures or flagging. For example, PLB 3290 ignored Operating Rule 707,

which is entitled "Work Authority to Work Without Flag Protection," and which provides, *inter alia*:

> 707(f) When *conditions* will not permit turning the track over to Work Force(s) *as prescribed in Rules 707(c) and 707(d)*, or if the nature of the work may cause equipment to foul adjacent tracks, *work by Work Force(s) may be performed under traffic without flag protection by use of a train order.*

App. 21a (emphasis added).13/

The majority below also found that, having failed to draw the essence of its award from the contract, PLB 3290, contrary to law and the express restriction upon its authority, rewrote the contract by "chang[ing] a substantive rule regarding flag protection - that is, that CSXT no longer has discretion to choose the means of protecting workers." App. 24a. PLB

13/ The minority below clearly erred in asserting that Rule 707(f) "does not provide an alternative to flagging in all circumstances and under all conditions." App. 14a. First, the minority erred in interpreting rules which PLB 3290 ignored and, by so construing the parties' agreement, committed the precise error that it claimed the district court had made. Second, in quoting and discussing the "conditions" referred to in Rule 707(f), the minority omitted the crucial cross-references to Rules 707(c) and (d), quoted above, which provide procedures for protecting track sites without flag protection by completely eliminating train traffic on the affected track. J.A. 41-42. When "conditions," i.e., traffic levels, will not permit CSXT to take the track upon which work will be performed completely out of service *or* if work on one track will interfere with adjacent tracks, Rule 707(f) clearly gives CSXT the discretion to control traffic by train order without flagging. There is absolutely nothing in the terms of Rule 707, which is devoted *in its entirety* to controlling train movements *without flag protection*, that establishes conditions precedent to this exercise of CSXT's discretion. Further, even if Rule 707 imposed any form of "conditions," it is absolutely clear, as the majority below observed, that UTU never contested "the existence of conditions giving CSX discretion [to use train orders]" before PLB 3290, the district court or the Sixth Circuit. App. 21a n.1.

3290 would in effect require CSXT always to use flagging--contrary to undisputed past practice and unambiguous operating rules. Further, the majority in *UTU v. CSXT* found that PLB 3290 had not merely erred in interpreting the collective bargaining agreement, but had completely "failed to consider the contract language or the 'law of the shop' here expressed in written rules which vested authority with CSX to determine whether to use flagmen or issue train orders at construction sites." App. 24a.

UTU's mere disagreement with the Sixth Circuit's application of well established standards to the particular facts in *UTU v. CSXT* does not present an important issue meriting review, as illustrated by this Court's repeated denial of writs of certiorari in cases in which courts of appeals have held that arbitral awards must be set aside based on jurisdictional defects similar to those found in *UTU v. CSXT*.14/ Further, *Dixie Warehouse & Cartage Co. v. Teamsters, Local 89*, 133 L.R.R.M. (BNA) 2942 (6th Cir. 1990), cited by UTU, confirms that the Sixth Circuit recognizes and applies the correct standard and simply reaches different results based on different facts. In *Dixie Warehouse* the Sixth Circuit, citing this Court's decision in *Misco*, refused to vacate an arbitral award, holding that "an arbitrator [may] construe the contract to give him authority to review penalties in the absence of a provision

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14/ *See, e.g., Beardsly v. Chicago & N.W. Transp. Co.*, 850 F.2d 1255, 1271 (8th Cir. 1988)(vacating arbitral award that was found to be "not in any way derived from the 'wording or purposes of the collective bargaining agreement'"), *cert. denied*, 109 S. Ct. 1340 (1989); *Baltimore & O. R.R. v. Brotherhood of Ry., Airline & S.S. Clerks*, 108 Lab. Cas. (CCH) ¶ 10,261 (4th Cir. 1987)(award vacated for failure to discuss critical contract terminology), *cert. denied*, 484 U.S. 1008 (1988); *Sears, Roebuck & Co. v. Teamsters Local Union No. 243*, 683 F.2d 154, 156 (6th Cir. 1982)(rewriting unambiguous contract terms), *cert. denied*, 460 U.S. 1023 (1983); *Detroit Coil Co. v. International Ass'n of Machinists & Aerospace Workers*, 594 F.2d 575, 579 (6th Cir.)(award that was not rationally derived from contract or past practice must be set aside), *cert. denied*, 444 U.S. 840 (1979).

explicitly prohibiting such action." 133 L.R.R.M. at 2946. There is absolutely no conflict in the legal standards applied in *Dixie Warehouse* and *UTU v. CSXT*--both decisions expressly applied the standards of review set forth in *Enterprise Wheel*, and *Dixie Warehouse* expressly recognized that arbitrators exceed their jurisdiction if they "ignore[ ] the 'clear and unambiguous' language of the contract." *See* App. 22a and 133 L.R.R.M. at 2944. Indeed, Judge Kennedy, who authored the majority opinion in *UTU v. CSXT*, voted to affirm the award in *Dixie Warehouse*. Further, neither *Misco* nor *Dixie Warehouse* is in conflict with *UTU v. CSXT*, because neither involved an arbitrator's ignoring unambiguous portions of the parties' agreement evidencing a company's unilateral right to determine how safely to conduct its operations, i.e., to determine the "need" for flagging or an alternative procedure, to protect obstructed track.

Thus, *UTU v. CSXT* does not conflict with the precedent of this Court or other decisions of the Sixth Circuit and does not warrant review by this Court.15/ As will next be shown, it also does not conflict with the decisions of other courts of appeals.

II. The Sixth Circuit's Determination That The Public Law Board Exceeded Its Jurisdiction Does Not Conflict With Decisions Of Other Courts Of Appeals

UTU relies upon various decisions from the Second, Fifth, Seventh and Eighth Circuits to establish a conflict with *UTU v. CSXT* or demonstrate an important issue. UTU asserts that these decisions establish a risk of inconsistent adjudications, citing *St. Louis-S.W. Ry. v. Brotherhood of Ry., Airline & S.S.*

15/ Even if *UTU v. CSXT* were in conflict with *Dixie Warehouse*, which it is not, conflicts between decisions of the same circuit do not normally warrant review by this Court. *See Davis v. United States*, 417 U.S. 333, 340 (1974).

Clerks, 484 U.S. 907, 908 (1987)(White, J., with whom Brennan, J. joined, dissenting from denial of writ of certiorari).

There is no similarity between the issues presented in *St. Louis-S.W. Ry.* and *UTU v. CSXT*. *St. Louis-S.W. Ry.* presented a direct conflict on a question of federal law--whether an arbitrator may award pure penalty pay absent explicit contractual authorization. 484 U.S. at 908. In contrast, *UTU v. CSXT* does not present a cognizable legal conflict. Indeed, the standard of review applied by the Sixth Circuit in *UTU v.CSXT* has been uniformly acknowledged by other courts of appeals, including the courts that UTU claims are in conflict with the Sixth Circuit's decision in *UTU v. CSXT*. *See, e.g., Beardsly v. Chicago & N.W. Transp. Co.*, 850 F.2d 1255, 1270-71 (8th Cir. 1988), *cert. denied*, 109 S.Ct. 1340 (1989); *Schneider v. Southern Ry.*, 822 F.2d 22, 24 (6th Cir. 1987); *Hill v. Norfolk & W. Ry.*, 814 F.2d 1192, 1195 (7th Cir. 1987)(standard of judicial review is whether Board "interpreted the contract"; party can complain "if the arbitrators don't interpret the contract--that is, if they disregard the contract and implement their own notions of what is reasonable and fair"); *Walsh v. Union Pac. R.R.*, 803 F.2d 412, 414 (8th Cir. 1986)("it is well-established that if an arbitrator's award does not draw its essence from the collective bargaining agreement, the reviewing court must vacate or modify the award."), *cert. denied*, 482 U.S. 928 (1987).

It is equally well-settled that an arbitrator may not amend the collective bargaining agreement. *See Wilson v. Chicago & N.W. Transp. Co.*, 728 F.2d 963, 967 (7th Cir. 1984)(vacating arbitral award that disregarded contractual time limitations--"[t]his attempt to rewrite the agreement is a clear violation of the Railway Labor Act, and is a proper basis for the district court to set aside the awards."); *see also, e.g., In re Marine Pollution Service, Inc.*, 857 F.2d 91, 96 (2d Cir. 1988)(vacating arbitral award that was not based on an express or implied term of the collective bargaining agreement); *Sears, Roebuck*

& Co. v. Teamsters Local Union No. 243, 683 F.2d 154, 156 (6th Cir.1982)("arbitrator exceeded his authority by amending the express terms of the agreement"), *cert. denied.*, 460 U.S. 1023 (1983).

The appellate decisions upon which UTU relies apply the same legal standards as the Sixth Circuit in *UTU v. CSXT*, but distinguishable facts mandated affirmance of the arbitral awards. For example, the decisions of the Seventh Circuit cited by UTU merely affirm arbitral awards that were found to be logically derived from the collective bargaining agreement. *See C&NW Transp. Co. v. United Transp. Union*, 134 L.R.R.M. (BNA) 2607, 2608 (7th Cir. 1990)(arbitral board "'rationally arrived at an interpretation of the [contract]'"); *Hill v. Norfolk & W. Ry.*, 814 F.2d at 1195-7 (affirming arbitral award that expressly interpreted a term of the collective bargaining agreement, *i.e.*, the term "conviction" in an operating rule incorporated in the agreement). Neither *C&NW* nor *Hill* involved, as here, a complete disregard of the contract and the changing of its terms. In those circumstances, the Seventh Circuit would clearly vacate the arbitral award. *See Wilson v. Chicago & N.W. Transp. Co.*, 728 F.2d at 967 (vacating award that "attempt[ed] to rewrite the agreement").

The Eighth Circuit's decision in *Walsh v. Union Pac. R.R.*, 803 F.2d at 414, cited by UTU, is inapposite, and simply affirmed an arbitral award ordering that an employee be reinstated without backpay. The decision in *Walsh* was based on the deference given to arbitrators in formulating remedies, and the Eighth Circuit expressly found that "the award . . . was the [arbitral] Board's well-considered attempt to balance the conduct of the parties in light of the existing labor contract." *Id.* *Walsh*, which did not involve an arbitrator's ignoring the contract and past practice, hardly demonstrates a conflict between the Eighth and Sixth Circuits. Indeed, the Eighth Circuit's more recent decisions clearly hold that arbitral awards that do not discuss probative parts of the contract are

not entitled to be enforced--a position fully consistent with *UTU v. CSXT*. *See George A. Hormel & Co. v. United Food & Commercial Workers, Local 9*, 879 F.2d 347 350-2 (8th Cir. 1989)(citing *Beardsly v. Chicago & N.W. Transp. Co.*, 850 F.2d at 1263, 1270-1).

Similarly, *Skidmore v. Consolidated Rail Corp.*, 619 F.2d 157, 159 (2d Cir. 1979), *cert. denied*, 449 U.S. 854 (1980), and *Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228, 234 (5th Cir. 1970), merely involved alleged misinterpretations of the contract by the arbitrator. Both the Second and Fifth Circuits, however, clearly permit courts to vacate awards that are not based on or ignore an express or implied term of the collective bargaining agreement. *See In re Marine Pollution Service, Inc.*, 857 F.2d at 94-6; *Diamond*, 421 F.2d at 233 (arbitral award is not "conclusive" when, *inter alia*, it is "so unconnected with the wording and purpose of the collective bargaining agreement as to 'manifest an infidelity to the obligation of the arbitrator'")(quoting *Central of Georgia Ry.*, 415 F.2d at 411-2).

In summary, there simply is no conflict between the circuit courts of appeals to resolve--the standards applied by each of the circuits are identical and authorize vacating arbitral awards that exceed the arbitration board's jurisdiction. The Sixth Circuit's application of these uniform standards to the unique facts in *UTU v. CSXT* does not present a conflict with the other courts of appeals warranting review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 3, 1990